Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1712

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTH DAKOTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

WALTER W. BARNETT
JAMES W. CLUTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Holt Civic Club v. *Tuscaloosa*, 439 U.S. 60 ..... 2, 3, 4

Little Thunder v. *South Dakota*, 518 F. 2d 1253 ..... 1, 2

South Dakota v. *United States*, Civil Action No. 80-1976 (filed Aug. 6, 1980) 5

Constitution and statutes:

United States Constitution:

First Amendment 2

Fourteenth Amendment, Equal Protection Clause 1, 2, 3

Fifteenth Amendment 2

Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.* :

42 U.S.C. 1971 2

42 U.S.C. 1971(a)(1) 2

42 U.S.C. 1971(a)(2)(A) 2

42 U.S.C. 1973 2

42 U.S.C. 1973c 5

Miscellaneous:

S.D. Comp. Laws Ann. § 7-17-6 (1967) 4

1979 S.D. Sess. Laws ch. 45 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1712

SOUTH DAKOTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that residents of an unorganized county in South Dakota who vote for officers of an attached organized county may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, be barred on residency grounds from running for elective county offices in the organized county, where the holders of those offices collectively exercise general governmental powers over both counties. The court of appeals' decision is correct and does not conflict with decisions of this Court or other courts of appeals. There is, accordingly, no reason for further review.

1. In *Little Thunder* v. *South Dakota*, 518 F. 2d 1253 (8th Cir. 1975), the court of appeals ruled that residents of South Dakota's unorganized counties have a right to vote for elected officials of those organized counties to which

they are attached for governmental and administrative purposes because each pair of organized-unorganized counties forms "a single unit of local government." 518 F. 2d at 1256.[1] In April 1976, an Indian resident of unorganized Shannon County attempted to run for county commissioner of Fall River and Shannon Counties, one of two remaining pairs of organized-unorganized counties (Pet. App. A-10). Petitioners refused to file this person's nominating petition because he did not reside in Fall River County and, as a consequence, his name did not appear on the ballot (*id.* at A-11).

The United States filed suit in the United States District Court for the District of South Dakota, alleging that petitioners had violated 42 U.S.C. 1971(a)(1) and (a)(2)(A), Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution (Pet. App. A-11). The district court rejected the claim under 42 U.S.C. 1971 on the ground that proof of invidious discrimination was lacking, and it rejected the United States' Fourteenth Amendment claim on the ground that this Court's decision in *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60 (1978), had effectively overruled *Little Thunder*, on which the claim was based. It did not specifically address the other claims (Pet. App. A-12).

2. The court of appeals reversed the district court's judgment, finding that petitioners' residency restriction on the right to run for office denied Shannon residents equal protection of the laws (Pet. App. A-15).[2] The court of

---

[1]A more detailed description of the relationship between South Dakota's organized and unorganized counties is set forth in *Little Thunder* v. *South Dakota*, *supra*, 518 F. 2d at 1254-1255.

[2]The court of appeals did not consider our Voting Rights Act claim, which alleged purposeful racial discrimination, but decided the case on the basis of our nonracial Fourteenth Amendment claim, because it

appeals observed that, given its ruling in *Little Thunder* (which it refused to reconsider), Shannon residents had sufficient interest in voting for Fall River officials. It was "unable to accept the argument that a heightened level of interest is necessary before a Shannon County resident is entitled to run for office" (Pet. App. A-21).

3. Petitioners essentially contend (Pet. 20-25) that the court of appeals erred in its equal protection holding with respect to the ineligibility of Shannon County residents for county office because the holding is predicated in part on the court of appeals' earlier decision concerning the voting rights of Shannon County residents in *Little Thunder* v. *South Dakota, supra.* That decision, petitioners assert, is erroneous under the standards of *Holt Civic Club* v. *Tuscaloosa,* 439 U.S. 69 (1978), for assessing the constitutionality of subjecting particular areas to governmental regulation without extending the franchise to residents of those areas. Petitioners concede (Pet. 21) on the basis of a passage in *Holt* (439 U.S. at 73 n.8), that "this Court distinguished the factual situation presented in *Holt Civic Club* from the one found in *Little Thunder* * * *." Petitioners suggest (Pet. 22), however, that both the decision in *Little Thunder* and this Court's treatment of *Little Thunder* reflected an "incomplete factual background" that obscured the relationship of the county offices in question to both Fall River County and Shannon County.

---

concluded that "the Equal Protection claim rais[ed] in this case was implicitly decided in favor of the United States in the *Little Thunder* decision" (Pet. App. A-15 to A-16). The court of appeals also ruled that the United States is authorized to bring Fourteenth Amendment claims in conjunction with other claims alleging racial discrimination in voting (*id.* at A-15 to A-16). Petitioners do not seek review of that ruling.

Petitioners do not identify any facts not in existence when *Little Thunder* was decided nor do they contend that the features of the state statutory scheme on which they rely for their view (Pet. 23-24) that governing bodies of organized counties have little discretionary power over unorganized counties are recently enacted provisions. Considering essentially the same statutory scheme it had previously examined in *Little Thunder*, the court of appeals observed (Pet. App. A-24) that "officials of Fall River County exercise general governmental functions with respect to Fall River County and Shannon County." The factors cited by petitioners as exceptions to that general rule do not reveal that conclusion to be incorrect.

As petitioners indicate (Pet. 13, 15), Shannon County residents have their own county school board and highway board, but the existence of a separately elected or appointed school board or roads commission is not generally thought to mean that citizens would have no significant interest in the decisions of general governmental bodies, such as boards of county commissioners, that manage local government. Similarly the authority exercised by the organized county officers over Shannon county residents is not diminished in any important way by the fact that those officers must keep separate records and tax fund deposits for Shannon County (Pet. 14) and are limited in the amount of property tax they can levy on Shannon County residents (Pet. 13-14) or that Shannon County may have its own deputy sheriff (Pet. 14-15), an officer who is appointed by the Fall River County sheriff (S.D. Comp. Laws Ann. § 7-17-6 (1967)). In sum, the broad general authority of the county officers over the affairs of Shannon County clearly makes *Little Thunder* distinguishable from the unique factual circumstances in *Holt Civic Club* that supported the holding in that case. See *Holt Civic Club* v. *Tuscaloosa*, *supra*, 439 U.S. at 72-73 n.8; *id.* at 78 (Stevens, J., concurring).

Given its holding in *Little Thunder* that Shannon County residents are constitutionally entitled to vote for the county officers who govern both Fall River County and Shannon County, the court of appeals correctly concluded that otherwise qualified Shannon County residents are similarly entitled to run for those county offices. *Holt Civic Club,* which concerned only the right to vote, provides no basis for attacking the court of appeals' holding (Pet. App. A-21) that, where residency restrictions are involved, no more need be shown to establish the right to run for office than to establish the right to vote. Indeed, petitioners do not appear to dispute this proposition.

4. Finally, it should be noted that the South Dakota legislature has repealed many of the most significant features of the statutory scheme that petitioners would have this Court consider in the course of determining the correctness of the decision below; and the legislature has, at the same time, enacted a new plan for the administration of the unorganized counties. 1979 S.D. Sess. Laws ch. 45. As the court of appeals noted (Pet. App. A-25 n.6), this law has not gone into effect because the Attorney General has interposed an objection pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. An action challenging the objection is now pending in the United States District Court for the District of Columbia, *South Dakota* v. *United States,* Civil Action No. 80-1976 (filed Aug. 6, 1980). That case is going forward in its discovery phase, but settlement discussions are continuing. Depending on its outcome, the issue in this case could become moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

WALTER W. BARNETT
JAMES W. CLUTE
Attorneys

MAY 1981

DOJ-1981-05